BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the	)	MB Docket No. 05-311
Cable Communications Policy Act of 1984	)	
as Amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	
	)	
Further Notice of Proposed Rulemaking	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

Joseph W. Waz, Jr.
COMCAST CORPORATION
1500 Market Street
Philadelphia, Pennsylvania 19102

James R. Coltharp
COMCAST CORPORATION
2001 Pennsylvania Ave., *NW*
Suite 500
Washington, D.C. 20006

Thomas R. Nathan
Jeffrey A. Jacbos
COMCAST CABLE COMMUNICATIONS, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102

Wesley R. Heppler
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, *NW*
Second Floor
Washington, D.C. 20006
Attorney for Comcast Corporation

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Corncast Corporation ("Corncast") hereby responds to comments addressing the Commission's *Further Notice of Proposed Rulemaking ("Further Notice")* in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The Commission's stated objective in the *Report and Order* is to enhance multichannel video competition by expediting franchise grants to ILECs and other new video entrants.[2] Towards that goal, the Commission adopted rules as to franchise grant time limits and provided guidance as to the lawfulness of certain franchise demands under existing federal law. The rules establish a 90-day shot clock for a final decision on a franchise application by a new entrant and such rules would seem to have little relevance to an incumbent cable operator's existing

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[1] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, rel. Mar. 5, 2007 ("Report and Order" or "Further Notice").

[2] *Report and Order* ¶ 1.

franchise.[3] However, the Commission's guidance as to the lawfulness of particular franchise terms is an important affirmation of federal law with equal applicability to new and incumbent cable operators. For this reason, Comcast respectfully requests that the Commission confirm that the guidance provided in the *Report and Order* applies to all cable service providers, whether incumbent or new entrant.

Further, a failure to apply the Commission's guidance to all cable operators will create a regulatory disparity that discourages incumbent cable operators from continuing their broadband expansion. As Commissioner McDowell has articulated in this proceeding, the goal is to "ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor."[4] With this regulatory touchstone in mind, there are two matters addressed in the comments that are central to achieving an evenhanded regulatory outcome in the *Further Notice.* First, the Commission's clarifications and restatements of law regarding permissible franchise fee and PEG/I-Net requirements under the Communications Act should immediately be applied to all cable operators. And, second, the continued validity of most favored nation ("MFN") clauses in franchise agreements should be confirmed.

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As initial comments on the *Further Notice* clearly established, the Commission's *Report and Order* clarified certain provisions of the Communications Act that are applicable to all cable

[3] In the interest of consistency with the "shot clock" provided in the context of franchise renewals under Section 626, the Commission may want to modify the rule's 90-day shot clock following the filing of a new franchise application to a 120-day shot clock.

[4] *Report and Order*, Statement of Commissioner Robert M. McDowell (p. 2 of Statement).

operators -- wholly apart from any consideration of competitive franchise grants. In particular, the Commission clarified and restated the legal boundaries for permissible franchise fees under Section 622, and for permissible PEG/I-Net requirements under Section 611. The Commission also recognized that the relevant franchise fee and PEG/I-Net statutory provisions "do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants."[5] The Commission further acknowledged that "some of the decisions in this *Order* also appear germane to existing franchisees."[6] Yet, inexplicably, the Commission then tentatively concludes that its findings in the *Report and Order* will not be applicable to existing cable operators until their franchise agreements expire.[7] That tentative conclusion should be rejected and replaced with a confirmation that the law is the law and it applies equally to everyone subject to it -- in this case, to all cable operators. As numerous commenters have demonstrated, there is no lawful or logical basis to delay application of the Commission's statutory clarifications.

The Commission also asks "what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises."[8] For a variety of legal and policy reasons, the *Report and Order* findings should have no effect upon most favored nation (or "MFN") clauses in franchise agreements. First, whether labeled "Level Playing Field" or "MFN",[9] clauses that do not require the imposition of particular franchising burdens upon new

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[5] *Report and Order* ¶ *140.*

[6] *Id.* ¶ 139.

[7] *Id.* ¶ 140.

[8] *Id.* ¶ 140.

[9] Franchise agreements sometimes use the terms "level playing field" or "most favored nation" interchangeably. For purposes of this Reply Comment, the term "level playing field clause" shall mean those clauses that require the imposition of burdens on a new entrant – which the Commission has found unreasonable and unenforceable. The term "MFN clause" shall mean clauses (however they may be titled in a franchise agreement) that allow for the modification of the incumbent's franchise agreement.

entrants, but instead lower franchise obligations for existing cable operators, do not present the deterrent effect the Commission seeks to prevent. Second, incumbent cable operators and franchise authorities have negotiated MFN clauses for precisely the purpose of adjusting existing franchise obligations when the franchise obligations of new competitors are not commensurate. Third, a reduction in existing franchising obligations is consistent with Commission policies of promoting price competition and ensuring that like services are regulated alike. Finally, franchise MFN clauses are not in conflict with any provision of the Communications Act, any FCC regulation, any FCC policy, or any applicable law. As a result, an attempt effort by the Commission to impair cable operators' MFN contractual rights will be both unlawful and subject to a constitutional challenge.

11. FRANCHISE FEE AND PEG/I-NET CLARIFICATIONS

Virtually all commenters, with the exception of franchising authorities, concur that the *Report* and *Order* clarifications pertaining to franchise fees and PEG/I-Net obligations are applicable to all cable operators." This broad spectrum of commenters provides further support for the Commission's tentative conclusion that the franchise fee and PEG/I-Net statutory provisions "do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.""

A. Support for Immediate and Equal Application of Cable Act Provisions

There is no serious debate as to whether the *Report* and Order's clarifications to Sections 611 and 622 of the Communications Act are applicable to all cable operators. The clarifications

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[10] *See e.g.*, Comments of Charter Communications, Time Warner Cable, NCTA, Verizon, RCN Telecom, Wide Open West Finance, Knology, Inc., Alcatel-Lucent and the Fiber-to-the-Home Council.

[11] *Report and Order* ¶ *140.*

are, after all, the Commission's statements as to what actions are and are not lawful under these statutory provisions -- such guidance *must* be applicable to all cable operators.[12] As the Commission noted in the *Report and Order*, "the general law with respect to franchise fees should be relatively well known, but we believe it may be helpful the restate the basic propositions here in an effort to avoid misunderstandings...".[13]

As the Fiber-to-the-Home Council observes:

> "These legal findings by the Commission interpret provisions of the statute applicable to all cable operators without qualification. **As** such, and because they bear very much on ongoing operations of existing providers, the Commission should declare they are effective for existing franchise agreements as of the effective date of the *Local Franchising Order* and are to be enforced accordingly.[14]

Several other commenters point out -- particularly as to Section 622 -- that the Commission's findings essentially constitute a restatement of existing law.[15] Having simply clarified the franchise fee restrictions already contained in Section 622, the Commission cannot lawfully deem that such restrictions are not applicable to existing franchise agreements. As such, these clarifications of Section 622 must be applicable to existing franchise agreements.

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[12] One new statement of policy by the Commission in the Report and Order does need further clarification as to its applicability to incumbent cable operators – PEG interconnection. The Commission assumes without analysis that there is a need for interconnection. In the vast majority of instances, there is no need for interconnection because PEG programming originates from sources independent of the incumbent cable operator, such as a town hall, a local high school, or a community public access studio. Just as new entrants must obtain their other programming (such as HBO, ESPN, CNN) from the source independent of the incumbent operator, so to should they obtain PEG programming from the source – which would only require PEG interconnection between competitors in the rare circumstance when the incumbent has sole control over the PEG programming origination point, such as a studio located on company property at a private headend or office facility.

[13] *Report and Order* ¶ 94.

[14] Comments of the Fiber-to-the-Home Council at p. **4-5.**

[15] *See e.g.*, Comments of Time Warner at 7; Comments of Verizon at 10; and Comments of Charter at 10.

A consistent line of cases has also established that franchising authorities and cable operators may not by agreement waive Cable Act restrictions.[16] If a particular franchising authority believes it has a franchise agreement that waives or supersedes provisions of the Communications Act, it is free to make such an argument in the event a challenge is raised. This is precisely the avenue that was pursued, unsuccessfully, by a few LFAs after the Commission issued its *Cable Modem Declaratory Ruling*[17] clarifying that a franchising authority could not impose franchise fees on non-cable services."

Further, the Commission's clarifications as to Section 622 franchise fee restrictions are equally applicable to states that have franchising statutes. As noted in the comments of Wide Open West, "the Commission should confirm that the portions of its discussion relating to the 5% franchise fee cap apply to all cable operators, whether incumbent or new entrants, and all franchising authorities, whether local or state."[19] Both Communications Act Section 636(c) and the Supremacy Clause require that the Section 622 restrictions be applied in state franchising jurisdictions as well.

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[16] *Cable TV Fund 14-A, Ltd. d/b/a Jones Intercable v. City of Naperville*, 1997 U.S. Dist. LEXIS 11511 (July 29, 1997) at *77, n.35; *Town of Norwood v. Adams-Russell Co.*, 549 N.E.2d 1115 (Mass. 1990); *City of Dubugue v. Group W Cable*, No. C -85-1046 (D. Iowa, June 18, 1986 and February 25, 1987); *City of Burlington v. Mountain Cable Co.*, Dkt. S1190-86CnC (Vt. Superior Ct., Dec. 31, 1986); aff'd, 559 A.2d 153 (Vt. 1988); cert. denied, 492 U.S. 919 (1989).

[17] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002) *("Cable Modem Declaratory Ruling"), rev'd, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9" Cir. 2003), *rev'd, NCTA v. Brand X*, 545 U.S. 967 (2005).

[18] *See Parish of Jefferson v. Cox Communications Louisiana, LLC*, No. Civ.A. 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003); *City of Chicago v. AT&T Broadband, Inc.*, No. 02-C-7517, 2003 WL 22057905 (N.D. Ill. Sept. 4, 2003), *vacated on other grounds sub nom City of Chicago v. Comcast Cable Holdings, L.L.C.* 384 F.2d 901 (7th Cir. 2004); *Time Warner Cable-Rochester v. City of Rochester*, No. 03-CV-6257 (W.D.N.Y. Dec. 12, 2003) (ruling from bench); *City of Minneapolis v. Time Warner Cable Inc.* et al., 2005 U.S. Dist LEXIS 27743 (Civ. 05-994) (D. Minn. Nov. 10, 2005).

[19] Comments of Wide Open West at p. 6.

B. LFA Comments on Franchise Fee and PEG/I-Net Clarifications

Local franchising authorities ("LFAs") were alone in advancing the position that *none* of the Commission's findings in the *Report and Order* were applicable to existing cable operators. While LFA arguments as to the scope of the Commission's Section 621(a)(1) jurisdiction and as to the preemptive effect of Section 626 may have merit in the context of the franchise grant procedures addressed in the *Report and Order*[20], they are inapplicable to the Commission's franchise fee and PEG/I-Net statutory clarifications. **A** wide variety of commenters confirmed that the Commission's clarifications and restatements of law as to Section 622 and Section 611 are wholly independent of any Commission jurisdiction that might exist under Section 621(a)(1).[21] As a result, except where specifically limited by the provisions of the Communications Act, the Commission retains its general authority to interpret and clarify provisions of the Act.[22]

One LFA commenter, however, argues that the Commission's franchise fee and PEG/I-Net findings should not be applied to existing cable operators because there are instances where agreements to make PEG financial contributions or to construct or operate I-Nets are done "outside'' the franchise agreement.[23] While that might be an argument an LFA may raise in defense of a future challenge to such requirements, it does not require or warrant the Commission limiting the *Report and Order* to new entrants.

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[20] Although the Comments of NATOA do not concede the application of any of the Commission's findings to existing operators, NATOA does note: "In particular, the 'shot clock', build-out and 'mixed-use networks' aspects of the *Order* do not, and cannot have any application to incumbent operators." Comments of NATOA at p. 13.

[21] *See e.g.,* Comments of NCTA at pp. 10-18, Comments of Verizon at pp. 10-11, Comments of Time Warner at pp. 8-12, Comments of Charter at p. 11, Comments of Wide Open West at pp. 4-6 and 11-13, and Comments of the Fiber-to-the-Home Council at p. 4.

[22] *See e.g., California Metro Mobile Comm. v. FCC.*, 365 F.3d 38 (D.C. Cir. 2004).

[23] Comments of Burnsville/Eagan Telecommunications Commission, et. al at p. 21-22.

Another LFA commenter lists the significant telecommunications cost savings that certain LFAs have obtained through franchise required I-Nets.[24] Even significant telecommunications costs savings for LFAs, however, do not establish such I-Nets are "cable-related" franchise requirements. As set forth in Communications Act Section 611(b), LFAs are allowed to request that "channel capacity on institutional networks be designated for educational or governmental use…". From that limited authorization, many LFA I-Net requirements have now morphed into complex telecommunications networks designed to reduce or eliminate an LFAs telecommunications costs on the backs of a limited subset of community residents -- cable video subscribers.[25] To the extent such I-Net requirements are "unrelated to the provision of cable services" they should be deemed "subject to the statutory 5% franchise fee cap" as the Commission so clarified Section 622 in its ***Report*** *and Order*.[26]

Finally, several LFA groups argue that simply because there are numerous long-standing franchise agreements which may now exceed the Section 622 franchise fee cap, the Commission's clarifications to Section 622 are somehow not applicable to such franchise agreements.[27] Again, this argument fails to address the fundamental issue of whether the provisions of those agreements are consistent the Cable Act. This is not the first time the Commission has interpreted the dimensions of the franchise fee cap. It is merely the latest. In addition to the *Cable Modem Declaratory Ruling*, the Commission has interpreted provisions of

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[24] Comments of Greater Metro Telecommunications Consortium, et. al at pp. 7 and 8.

[25] Comments of Charter at page 11, Comments of Time Warner Cable at footnote 8.

[26] *Report and Order* ¶ 108.

[27] See e.g., Comments of the Greater Metro Telecommunications Consortium, et. al. at page *6;* Comments of Burnsville/Eagan Telecommunications Commission, et. al at page **23** and Comments of the League of Minnesota City's, et. al. at p. 9.

Section 622 relating to gross revenues, pass throughs and itemizations.[28] In each case, the Commission's interpretation was given immediate preemptive effect. And the courts have sustained the preemptive effect of such interpretations.[29] The Commission is not free to grant LFAs a blanket "waiver" of compliance with Communications Act Section 622. The Commission's clarifications and restatement of law as to Section 622 are equally applicable to all cable operators and all LFAs.

C. AT&T's Mischaracterization of "Deregulation" and the Marketplace

The comments filed by AT&T require special mention inasmuch as they misinterpret the proceedings and the factual circumstances of competition in the telecommunications marketplace. First, AT&T misconstrues the questions raised by the *Further Notice* in stating that "AT&T generally supports efforts to deregulate incumbents as competitive conditions warrant it".[30] This is a mischaracterization of The *Further Notice,* which does not offer any "deregulation" of incumbent cable operators. The *Further Notice* raises only the limited question of whether Commission interpretations of existing statutes are applicable to existing franchise agreements.

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[28] See *In re City of Pasadena, California, the City of Nashville, Tennessee and the City of Virginia Beach Virginia: Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues,* 16 FCC Rcd. 18, 192 (2001); *Time Warner Entertainment/Advance-Newhouse Partnership and City of Orlando, Florida,* 14 FCC Rcd. 7678 (CSB 1999); *In re United Artists Cable of Baltimore: Petitions for Reconsideration of Order Issued by the Chief; Cable Services Bureau, In United Artists Cable of Baltimore's Appeal of Local Rate Order Adopted by the City of Baltimore, Maryland,* 11 FCC Rcd. 18158 (1996).

[29] See *Texas Coalition of Cities for Utility v. FCC,* 324 F. 3d 802 (5" Cir. 2003); *See Parish of Jefferson v. Cox Communications Louisiana, LLC,* No. Civ.A. 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003); *City of Chicago v. AT&T Broadband, Inc.,* No. 02-C-7517, 2003 WL 22057905 (N.D. Ill. Sept. 4, 2003), *vacated on other grounds sub nom City of Chicago v. Comcast Cable Holdings, L.L.C.* 384 F.2d 901 (7" Cir. 2004); *Time Warner Cable-Rochester v. City of Rochester,* No. 03-CV-6257 (W.D.N.Y. Dec. 12, 2003) (ruling from bench); *City of Minneapolis v. Time Warner Cable Inc.* et **al.,** *2005* U.S. Dist LEXIS 27743 (Civ. 05-994) (D. Minn. Nov. 10, 2005).

[30] Comments of AT&T at p. 3.

AT&T explains that its "support" for incumbent cable operators is tempered by the knowledge that telecommunications carriers remain subject to "unnecessary, asymmetrical regulatory requirements" despite the "robustly competitive" telecommunications market.[31] AT&T's support is further dampened by its observation that although there has been "some success" in multichannel video competition, such video competition cannot match the "robustly competitive" market that is faced by incumbent telecommunications carriers.

It is particularly interesting to hear AT&T, of all parties, complaining that the Commission does not do enough to relieve it of its regulatory burdens. AT&T and the other ILECs have, in fact, been the recipient of enormous regulatory largesse for many years.[32]

Perhaps AT&T's support would have been stronger had it considered the following. Regarding multichannel video competition, cable operator market share has dropped steadily over the past several years to the point where competitors now have over 30% of the market.[33] This compares most favorably to the market for telephone access lines where the ILECs retain an 87% share of the local voice market.[34] Comcast agrees that the potential benefits from a more vigorous competition for voice services can be truly enormous. Microeconomic Consulting &

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[31] *Id.* at p. 4.

[32] See e.g., *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533 (2005) (Triennial Review Remand Order ("TRRO") granting significant relief from unbundling obligations to incumbent LECs); and *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC Rcd 14853 (2005) ("Wireline Broadband Order") (finding that broadband Internet access service provided over telephone company line, whether copper or fiber, is an interstate information service); and *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers,* Memorandum Order and Opinion, 20 FCC Rcd 6830 (2005) (finding that state commissions may not require incumbent LECs to provide DSL over a UNE loop facility).

[33] *In the matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 12th Annual Report, 21 FCC Rcd. 2503, ¶ 7 (2006).

[34] Pelcovits, Michael and Haar, Daniel, *Consumer Benefits from Cable-Telco Competition,* Microeconomics Consulting & Research Associates, Inc. (2006), at p. 2.

Research Associates, Inc. has shown that over the next five years, consumers and small businesses can receive over $100 **billion** in economic benefits -- that is, lower prices for the same or better services than they are receiving today -- as a result of competition from cable operators and others against ILECs in the voice market.[35] Given these massive potential benefits -- which dwarf the consumer video market -- the Commission should reject any suggestion that it is no longer needed to monitor, regulate and improve competitive conditions in voice markets.

Comcast also agrees with AT&T that there are several issues in the voice telephony context which deserve the Commission's attention. Number portability, interconnection, universal service, and intercarrier compensation, to name just a few issues, have all been awaiting Commission action for some time. Comcast fully supports Commission action on those items that will increase the ability of companies like Comcast and other voice competitors to offer consumers a second facilities-based option for wireline voice service. Unlike the video market, where competitors can go head-to-head without substantially relying on each other, in the voice market even fully facilities-based competitors such as cable operators cannot compete at all without obtaining critical inputs from the ILEC. Voice competition won't work without the ILEC providing timely, technically efficient, and robust interconnection for the exchange of traffic between the two networks. Voice competition won't work without the ILEC providing prompt and efficient porting of telephone numbers. And voice competition won't work without the ILEC providing transit services to link competitors and third party carriers whose traffic volumes do not economically warrant a direct connection. Moreover, as long as the ILECs retain such a substantial majority of the local voice market, the ILECs will have strong incentives to use their dominant market position to harm its rivals -- by delaying and degrading

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[35] *Id.* **at p.** 20.

interconnection, number portability, and transiting. Preventing these abuses will require Commission vigilance for many, many years to come.

III. MOST FAVORED NATION CLAUSES

In its *Further Notice,* the Commission asks "what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises."[36] The answer is none. To the extent the Commission is asking whether its asserted preemption of "level-playing-field" ("LPF") franchise provisions likewise requires preemption of MFN clauses, the answer is no. In addressing LPF provisions, the Commission found that such provisions can "impose unreasonable and unnecessary requirements on competitive applicants".[37] The Commission went on to find that "local level-playing-field provisions impose costs and risks sufficient to undermine the business plan for a profitable entry in a given community, thereby undercutting the possibility of competition."[38] The key component in this Commission analysis is that LPF provisions will result in the *imposition* of unwarranted costs and burdens upon the new entrant -- thereby creating the potential for an unreasonable denial of a competitive franchise. **A** traditional MFN clause, however, imposes **no** burdens on the new entrant and allows the parties to address regulatory disparity by *reducing* the franchise requirements applicable to the franchised cable operator.

Unlike the LPF clauses which the Commission has objected to, the effect of an **MFN** clause is entirely bilateral; it does nothing more than modify an existing agreement between two contracting parties, in accordance with the terms of their agreement. MFN clauses are a

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[36] *Report and Order* ¶ 140.

[37] *Id.* ¶ 48.

[38] *Id.* ¶ 49.

contractual (i.e bargained for) statement of the LFA's intention to treat all cable operators in an even handed fashion and an assurance the playing field will not be tilted against the first mover by application of different standards to its competitors. In short, MFN clauses anticipate and speak directly to the circumstance of how the relationship between the LFA and the incumbent operator is to be altered in the event subsequent competitors are permitted to provide service on less burdensome terms than were demanded of the existing operator. They reflect the parties' understanding 1) that the first entrant not be harmed for having committed its resources to the community earlier than others were prepared to do and **2)** that as competition increases, the LFA's need to regulate diminishes.

Further, although all cable operators should immediately be subject to the Commission's franchise fee and PEG/I-Net clarifications without the need of an MFN clause, there are a vast array of other franchise provisions that a new entrant may obtain on terms more favorable than those contained in an existing franchise agreement. Such provisions include office location requirements, reporting requirements, enforcement penalties, relocation obligations, state-of-the-art requirements, and many more.

Because MFNs allow franchise disparity to be resolved through a *reduction* of franchise requirements, such clauses are consistent with the Commission's policies of reducing regulatory costs through competition, and regulating like services alike. Importantly, these goals are being accomplished through a negotiated contract provision. As the New Jersey Division of Rate Counsel stated:

> With respect to most favored nation clauses, such clauses are matters that rest with the LFA and cable operator and should be

> dealt with by these parties. The FCC has no role to play in these purely local matters.[39]

Alcatel-Lucent also observes that MFN clauses were "included in franchise agreements specifically so that incumbents could amend their agreements if new entrants had differing franchise obligations."[40]

Because MFN clauses allow for the resolution of a disparity in franchise obligations through the reduction of existing franchise requirements, such provisions are fully consistent with the policies and goals of the Commission's *Report and Order*. Further, such MFN clauses are consistent with all Communication Act provisions, FCC regulations and other applicable law. **As** a result, there is no lawful basis for the Commission to interfere with these negotiated contractual provisions. Finally, although the constitutional prohibition on impairment in the Contracts Clause is a limitation on the powers of the states, the FCC is restrained in its ability to "impair" contracts by operation of the Fifth Amendment.[41] Such constitutional scrutiny would be particularly appropriate in this instance where impairment of MFN rights would serve no regulatory purpose, but would instead simply favor one competitor over another.

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[39] Comments of the New Jersey Division of Rate Counsel at p. 6.

[40] Comments of Alcatel-Lucent at p. 5.

[41] *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 **U.S.** 102,162 (1974) ("Though the federal government is not so enjoined [by the Contracts Clause], it is restrained by the Fifth Amendment . . . Congress, apart from the bankruptcy power in Art. **I,** sec.8, may not impair the obligation of contracts without violating the Due Process Clause.") (Douglas, J., dissenting). *See also United States v. Appalachian Elec. Power Co.*, 107 F.2d 769,796 (4" Cir. 1939) ("While Congress may impair the effectiveness of executory contracts which interfere with the exercise of the interstate commerce power, we are not aware of any authority which would justify the taking of private property without compensation as an exercise of the regulation of commerce"), *rev'd on other grounds*, 311 **U.S.** 377 (1940).

IV. CONCLUSION

The *Further Notice* provides the Commission with an opportunity to advance an important goal -- regulatory neutrality for franchised cable operations. For the reasons set forth herein, the Commission's clarification and restatements of law as to franchise fee and PEG/I-Net requirements under the Cable Act must be applicable immediately to all cable operators. Further, there is no lawful regulatory basis for preempting or otherwise limiting MFN clauses in franchises agreements.

Respectfully submitted,

Wesley R. Heppler
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, *NW*
Second Floor
Washington, D.C. 20006
Attorney for Comcast Corporation

Joseph W. Waz, Jr.
COMCAST CORPORATION
1500 Market Street
Philadelphia, Pennsylvania 19102

James R. Coltharp
COMCAST CORPORATION
2001 Pennsylvania Ave., *NW*
Suite 500
Washington, D.C. 20006

Thomas R. Nathan
Jeffrey A. Jacobs
COMCAST CABLE COMMUNICATIONS, LLC
1500 Market Street
Philadelphia, Pennsylvania 19102

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